

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

KINGS FALLS POWER CORPORATION

Debtor

CASE NO. 94-62115

Chapter 11

IN RE:

FOURTH BRANCH ASSOCIATES

Debtor

CASE NO. 94-62116

Chapter 11

APPEARANCES:

THE QUINN FIRM
Attorneys for Debtor
The Lincoln House
284 State Street
Albany, New York 12207

DONNA M. QUINN, ESQ.
Of Counsel

WALSH & WALSH, ESQS.
Attorneys for General Partner
494 Broadway - Suite 324
Saratoga Springs, New York 12866

MARIANNE WALSH, ESQ.
Of Counsel

D'AGOSTINO, HOBLOCK, GREISLER &
SIEGAL, P.C.
Attorneys for Key Bank
39 North Pearl Street
Albany, New York 12207

CHRISTIAN H. DRIBUSCH, ESQ.
Of Counsel

STROCK, STROCK & LAVAN, ESQS.
Attorneys for Teachers Insurance &
Annuity Association
Seven Hanover Square
New York, New York 10004

FRED HODARA, ESQ.
Of Counsel

PHILLIPS, LYTLE, HITCHCOCK,
BLAINE & HUBER, ESQS.
Attorneys for Teachers Insurance &
Annuity Association
3400 Marine Midland Center
Buffalo, New York 14203

ARTHUR J. BRONSON, ESQ.
Of Counsel

HISCOCK & BARCLAY, ESQS.
Attorneys for Key Bank
Financial Plaza
P.O. Box 4878
Syracuse, New York 13221-4878

ERIC CHARLTON, ESQ.
Of Counsel

KEVIN PURCELL, ESQ.
Office of U.S. Trustee
50 Chapel Street
Albany, New York 12207

MICHAEL COLLINS, ESQ.
Office of U.S. Trustee
10 Broad Street
Utica, New York 13501

STEPHEN D. GERLING, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Quinn Firm ("Quinn") filed a motion on July 29, 1994 seeking appointment as counsel to Fourth Branch Associates ("FBA") and Kings Falls Power Corporation ("KFPC"), in connection with the voluntary petitions filed by both Debtors pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. §§101-1330)("Code") also filed on July 29, 1994.¹

In addition to seeking appointment, Quinn's motions seek authority to accept a post-petition retainer of \$20,000 from the Debtor in the FBA case and to permit the Debtor's general partner to complete payment of the retainer in the KFPC case, to make interim fee applications within the first 30 and 90 days of the cases pursuant to Code §331 and to make such applications at 120-day intervals thereafter.

The motions initially appeared on the Court's calendar at Syracuse, New York on August 9, 1994 and were thereafter adjourned at the movant's request to August 16, 1994.

¹ By Order dated September 29, 1994 these Chapter 11 cases are being jointly administered.

At the August 16th hearing on the motions, opposition was or had been interposed by the United States Trustee ("UST") and by the Teachers Insurance and Annuity Association of America ("TIAA"), an alleged secured creditor of the Debtor.²

JURISDICTIONAL STATEMENT

The Court has core jurisdiction of this contested matter pursuant to 11 U.S.C. §§1334(b) and 157(a)(b)(1) and (2)(A).

ARGUMENTS

Quinn, on behalf of the Debtor, contends that both Debtors' Chapter 11 cases will present the firm with "anticipated complexity" and will be "extremely labor intensive at the outset." For that reason Quinn seeks the Court's approval of a \$20,000 post-petition retainer in the FBA case and an almost immediate "draw down", on that retainer, because to require Quinn to wait "a period of five months would be a substantial hardship to The Firm." (See Motion of the Debtor pursuant to 11 U.S.C. §327 filed July 29, 1994.)

Quinn further asserts that its representation of FBA and its wholly owned subsidiary KHPC will not present either a potential or actual conflict of interest.

As indicated, the UST has apparently withdrawn its

² On August 23, 1994, Quinn filed supplemental affidavits in both cases, affidavits which apparently have caused the UST to withdraw its conflict of interest objections.

opposition to Quinn's appointment, however, TIAA contends that while it has no objection to Quinn's appointment, it does oppose the payment of any post-petition retainer by the Debtors to Quinn out of its alleged cash collateral.³

It does not appear that either the UST or TIAA object to Quinn's request that it be permitted to interpose interim fee applications at 30 and 90 day intervals, during the first 120 days and at 120-day intervals thereafter.

DISCUSSION

The law is well settled in this Circuit that post-petition attorney's fees of a Chapter 11 debtor cannot be paid from a secured creditor's collateral absent the creditor's actual consent or a showing that the attorney's services directly benefitted the secured creditor. See In re Flagstaff Foodservice Corp. 739 F.2d 73, 77 (2d Cir. 1984). Thus, in the instant case, if TIAA's security interest extends to each Debtor's post-petition cash flow pursuant to Code §552(b) or as TIAA alleges, the cash flow is in the nature of trust funds, no portion of said cash may be appropriated at this juncture to the payment of Quinn's post-petition retainer.⁴

³ At the oral argument before the Court on August 16, 1994, Quinn advised the Court emphatically that retainers in both cases were to be paid by the respective Debtors, however at paragraph 14 of the KFPC motion, the source of the retainer in that case is said to be "the Treasurer of the Debtor's General Partner, Peter Laquidara."

⁴ As of the date hereof, no determination has been made by this Court as to the extent of TIAA's allegedly secured claim.

With regard to Quinn's request that it be permitted to file interim fee requests within the initial 120 days following the date of the respective filing, this Court has no opposition. In fact, this Court has heretofore in an unpublished decision approved such a practice where the applicant can show special circumstances. See In re Abrantes Construction Corp., Case No. 91-00058 (Bankr. N.D.N.Y. May 20, 1991).

Thus, while the Court will grant Quinn's motions in both cases and appoint said firm as counsel for both FBA and KFPC, effective July 29, 1994, the date on which these motions were filed, and will further permit Quinn to file interim fee applications pursuant to Code §331 at 30 and 90 day intervals within the first 120 days of each case, at this point it must deny, without prejudice, Quinn's request for the payment of post-petition retainers by each Debtor from cash collateral as that term is defined in Code §363(a).

IT IS SO ORDERED.

Dated at Utica, New York
this day of September, 1994

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge